United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSE FERNANDEZ,

Plaintiff,

—against—

CHIOS SHIPPING CO., LTD.,

Defendant and Third-Party Plaintiff-Appellee,

—against—

MAHER STEVEDORING COMPANY, INC., and STATES MARINE LINES, INC.,

Third-Party Defendants-Appellants.

CHIOS SHIPPING CO., LTD.,

Fourth-Party Plaintiff-Appellee,

—against—

CASTLE & COOKE, INC., DOLE CORP. and CASTLE & COOKE FOODS CORP.,

Fourth-Party Defendant-Appellant.

BRIEF OF APPELLANT STATES MARINE LINES, INC.

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Statement of the Issues Presented for Review

1. Did the Court below err in holding that in this, a personal injury third-party indemnity action, the time charterer of a vessel under Clause 8 of the time charter must indemnify the shipowner for the damages in which it was cast to an injured longshoreman on the basis of an absolute obligation, in the nature of a warranty of safe and proper performance, regardless of any fault by the time charterer in a cargo discharge operation and, if so

2. Err, at the conclusion of the evidence at trial, in denying the time charterer's motion for a directed verdict as against the shipowner; ruling that the time charterer, as a matter of law, was required to supervise discharging of cargo; charging the jury that the time charterer was primarily responsible for cargo discharge and failing to instruct the jury on the issue as to whether or not the time charterer breached any duty in negligence in respect of cargo discharge.

Statement

The third-party defendant appellant, States Marine Lines, Inc. (now Isco, Inc. and referred to hereinafter as *Isco*), appeals from that portion of the opinion and order of Judge Constance Baker Motley dated January 15, 1976 and that portion of the final judgment entered, pursuant to that opinion and order, on January 19, 1976 granting indemnity in favor of Chios Shipping Co., Ltd. (*Chios*) as against third-party defendant appellant *Isco*.

The plaintiff longshoreman, employed by Maher Stevedoring Company, Inc. (*Maher*), sued the shipowner, *Chios*, to recover damages for personal injuries sustained by him on September 1, 1968 while working aboard the SS CHIOS

assisting in discharging pre-palletized cargo of cartoned pineapple from the No. 3 hold of SS CHIOS. It was alleged that the plaintiff's injuries were sustained by reason of the negligence of the shipowner and the unseaworthiness of the vessel. Defendant and third party plaintiff, *Chios*, impleaded *Isco*, time charterer, and *Maher* stevedore, as third party defendants. *Chios* sought indemnity from *Isco* on the basis that *Isco*, on a showing of negligence, had breached the time charter party in respect of the discharge of cargo. *Chios* sought indemnity from the third-party defendant, *Maher*, on the premise that *Maher*, as stevedore, retained to discharge the vessel, had breached its warranty of workmanlike performance. *Isco*, by cross-claim, made the same plea for indemnity against *Maher* in the event it were held liable to *Chios*. Thereafter and by leave of Court, Chios impleaded Castle & Cooke, Inc., Dole, a division of Castle & Cooke, Inc., (hereinafter referred to as *Castle & Cooke*), the shipper, manufacturer and assembler of the pre-palletized packaged cartons of pineapple. *Chios*, *Isco* and *Maher* sought indemnity from *Castle & Cooke* on claims of breach and express and implied warranty, negligence, strict liability in tort and breach of contract.

The case was tried before Judge Motley and a jury of six (6). The plaintiff's case as against the shipowner, *Chios*, was submitted to the jury on the basis of unseaworthiness only and the jury found against *Chios* on the basis of unseaworthiness and awarded the plaintiff the sum of $90,200 in damages.

Following the termination of the primary case, the third party indemnity claims of *Chios* and *Isco* as against *Maher* and *Castle & Cooke* and *Maher* against *Castle & Cooke* were submitted to the jury in interrogatory form. The indemnity claim of *Chios* against *Isco* was not given to the jury to determine alleged breach of the charter

party by *Isco* since the Court held *Isco* liable to *Chios* as a matter of law. The jury verdict granted indemnity in favor of *Chios* and *Isco* against *Maher* and *Castle & Cooke* and apparently indemnity in favor of *Maher* against *Castle & Cooke.*

Various post-trial motions by the defending parties culminated in the written decision of Judge Motley dated January 15, 1976 wherein Isco was held liable to indemnify *Chios* as a matter of law and *Maher* and *Castle & Cooke* were required to indemnify *Chios* pursuant to the jury findings. *Isco,* in turn, by Judge Motley's opinion and the judgment entered thereon, was awarded indemnity and counsel fees for all sums it was required to pay *Chios,* including *Chios'* counsel fees, against both *Maher* and *Castle & Cooke. Maher* was held jointly liable with *Castle & Cooke* and *Castle & Cooke* was denied indemnity from any party on *Castle & Cooke's* counterclaim and cross claims.

While *Isco* has been awarded indemnity and counsel fees from *Maher* and *Castle & Cooke,* it appeals from the decision of Judge Motley that it was legally liable in the first instance to indemnify *Chios* for any sums paid by *Chios* to the plaintiff.

Facts

The plaintiff, a longshoreman employee of *Maher* sued *Chios* to recover damages for personal injuries sustained by him while working aboard the SS Chios at Pork Newark assisting in discharging pre-palletized units of cartoned pineapples from the No. 3 lower hold of the ship. The plaintiff was a holdman and at or about the time of the accident, his gang, all employed by *Maher,* was engaged in discharging drafts of the pre-palletized cartoned pineapple from the No. 3 lower hold via the ship's gear.

In this process, a particular draft was being lifted overhead by a bridle attached to the fall of the boom when without apparent warning, the pre-palletized unit came apart causing one or more cartons to strike and injure the plaintiff (55, 56a). While there was testimony that the incident occurred when a pre-palletized unit was being moved by a hi-low machine owned by *Maher* and operated by an employee of *Maher*, the jury negated such a finding in its answer to interrogatory No. 2 posed to it in conjunction with the resolution of the third-party indemnity claims (34a).

At the conclusion of the presentation of the evidence, the Court dismissed the plaintiff's claim of negligence against *Chios* and the case was given to the jury as against *Chios* on the theory of unseaworthiness only (440-444a). The jury found the SS Chios unseaworthy and that such unseaworthiness was the proximate cause of the plaintiff's injuries. The basis upon which the jury resolved the issue of seaworthiness against Chios is found in the answers to interrogatories submitted to it in the resolution of the third-party claims (37a-39a). In answering questions No. 1, No. 4, No. 8, No. 9, and No. 10 of the interrogatories on the third party claims, the jury revealed that *Maher*, in breaching its warranty of workmanlike performance, had failed to properly supervise and direct its employees with respect to the unloading operation and to provide for the safety of its employees and that the breakage of the pre-palletized unit was the result of *Castle & Cook's* negligence; that the pre-palletized unit broke apart as a result of a latent or hidden defect and that such breaches of warranties and faults by *Maher* and *Castle & Cooke* were concurring proximate causes of the plaintiff's injuries (38a). So, it was at least these findings that formed the basis of the jury's determination that the Chios was unseaworthy.

At the time of the accident to the plaintiff, the SS CHIOS, an ocean going freighter, was owned, operated, maintained, manned and controlled by *Chios*. Prior to and on the date of accident of September 1, 1968, the SS CHIOS had been time chartered to *Isco* from *Chios* under a standard form American Produce Exchange Time Charter. Clause 8 of the time charter, the legal effect of which is the sole issue of this appeal, provided:

> "That the Captain shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the owners) shall be under the orders and directions of the charterers as regards employment and agency; and the charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the Captain who is to sign Bills of Lading for cargo as presented in conformity with the Mate's or Tally Clerk's receipts without prejudice to this Charter Party."

The charter party also contained the following Clause:

> "24. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled 'An Act relating to Navigation of Vessels, etc.' in respect of all cargo shipped under this charter to or from the United States of America. It is further subject to the following clauses which is to be included in all bills of lading issued hereunder:
>
> U. S. A. Clause Paramount
>
> "This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea

> Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

On the basis of clause 8 of the charter party, *Chios* impleaded *Isco* seeking indemnity were *Chios* liable to the plaintiff. *Chios* claimed indemnity from *Isco* on the basis of negligence, breach of warranty and breach of the charter party by *Isco*. There is no question that *Isco* did properly load, stow and trim the cargo (470a). *Chios*, it evolved, actually based its indemnity claim against *Isco* on the theory that the time charterer was obligated to supervise the discharge of the cargo and furnish the plaintiff a safe shelter in No. 3 hold (470a) and during the trial, *Chios* agreed with the Court (470a) that on the issue of indemnity, the time charterer, *Isco*, stood in the same shoes and made the same warranties as the stevedoring expert, *Maher*, paid by *Isco* to discharge the vessel's cargo. *Isco* contended that it could not be required to indemnify *Chios* under the law in this, a personal injury third-party action but at the very minimum, assuming that there was merit to *Chios*' assertions, the shipowner would have to prove negligence on *Isco's* part as a foundation for any indemnity. The circumstance that *Isco*, based on all of the testimony of this case, was free of any independent negligence in discharging was totally established (480a). On this basis and on the basis that *Isco* could not be legally liable to *Chios* under the charter party agreement, *Isco* moved for a directed verdict at the end of the presentation of all evidence but that motion was denied (425a).

Thereafter, *Isco* urged that the issue of *Isco's* alleged breach in whatever form should be submitted to the jury (R 747, 8) whereupon the Court ruled that *Isco* was primarily liable to discharge and supervise that discharge.

In ruling on *Isco's* requests to charge (480a), the Court accepted and indicated it would charge request No. 8 reading appropriate part as follows:

> "8. It is not enough for Chios to say that STATES is responsible because it was required to load, stow and trim and discharge. Chios is required to prove that if STATES (*Isco*) was obligated to load, stow and trim, that same was done in a negligent manner . . ."

At this point, the following colloquy took place:

> "The Court: We are adding 'discharge'. The last sentence of 8 is gratuitous. There is no proof that you negligently discharged so we will charge that the jury would have to find that you did something negligent, like failing to supervise.
>
> Mr. Larsen: You will charge number 8 in essence, your Honor?
>
> The Court: Yes.
>
> Mr. Larsen: All right."

The foregoing charge, in essence, was never submitted to the jury, rather the Court instructed the jury:

> "Now, as you know, the States Marine Lines chartered this boat or a portion of it to ship these goods because that is its business, to ship goods for others. In connection with that, it had agreement with the ship to stow and trim and discharge the cargo and pursuant to that agreement, it hired the stevedore."

> "Now, under the law, that charter, that is States Marine Lines, has the primary responsibility for loading and unloading. That is because it hires the stevedoring company and it pays the stevedore because what it is doing is shipping goods . . ."

Counsel for *Isco* specifically took exception with the foregoing quoted charge instructing the jury that Isco was primarily liable for the discharging operation (507a).

ARGUMENT

Chios was held liable to the injured plaintiff on the *Chios'* breach of its warranty of seaworthiness. Third-party defendant-appellant *Isco* contends that under clause 8 of the time charter between *Chios,* lessor, and *Isco,* lessee, *Isco* cannot be held legally liable to indemnify *Chios* in this, a personal injury third-party indemnity action.

The Court below, in its opinion, determined that *Isco* was obliged to indemify Chios grounding its decision on an analysis and conclusion of the holdings of this Court in *Nichimen Company* v. *M/V Farland,* 462 F. 2d 319 (2 Cir. 1972) and *Dempsey & Associates, Inc.* v. *SS Sea Star,* 461 F. 2d 1009 (2 Cir. 1972). These cases concerned claims for *cargo damage* wherein the rights and obligations between shipper, carrier and vessel were determined as defined and controlled by COGSA, Title 46 U.S.C., Sec. 1300 et seq. and a similar time charter. *Nichimen,* supra, construed a similar clause 8 in the time charter between the lessor and the lessee to resolve the issue whether the shipowner or charterer would be liable for *cargo damage* due to negligent stowage by a cargo specialist. Under the facts of *Nichimen,* supra, the Court held that time charterer under clause 8 (load, stow, trim, under the supervision of the Captain) was responsible

for improper stowage of cargo with resultant damage to it. The issues of responsibilities of the shipowner and time charterer and indemnity rights were in effect resolved on a showing of negligence as was the case in *Dempsey & Associates, Inc.* v. *S.S. Sea Star,* supra.

The opinion of the Court below in its analysis of *Nichimen,* supra, stated in part as follows:

> "It is not entirely clear to what extent, if any, the shipowner's right to indemnification was dependent upon some showing of negligence—either direct or imputed—on the part of the charterer. While Judge Friendly spoke of the 'primary negligence' of 'the charterer's agent,' the opinion revealed no evidence of direct negligence by the *port agent;* rather the negligence in the case appears to be that of the stowage 'specialist' *hired* by the port agent. As a matter of agency law, it seems entirely possible that the 'specialist' might be deemed an 'independent contractor', whose negligence might or might not be imputed to his employer, although that issue was not discussed in the opinion."
>
> "It may be that the finding of negligence on the part of the charterer's agent, therefore, is dependent upon the Court's holding that the duty of care imposed under the charterer by Sec. 3(2) of the Carriage of Goods by Sea Act (COGSA) is nondelegable, 462 F. 2d at 330, and that the charterer is, in effect, vicariously liable under COGSA for the negligence of even independent contractors which it hires. If that were the crux of the Court of Appeals' reasoning, then the charterer's liability for indemnification would be confined to cargo damage cases governed by COGSA, absent some showing of either direct negligence by the charterer,

> or negligence imputable to him under the law of agency." (18, 19a)

The Court below, in analyzing *Dempsey & Associates, Inc.* v. *S.S. Sea Star,* supra, went on to state (19, 20a):

> "The Court of Appeals affirmed the finding of the District Court that the time charterer had breached its duty to load and stow the goods, apparently because the *stowage was deemed negligent,* 461 F. 2d at 1016, and granted the ship owner indemnity from the charterer in the amount of the cargo damage. Again, it is not entirely clear whether the finding of the charterer's negligence was dependent upon the fact that the charterer's agent designed the stowage plan . . . or whether it was vicarious—predicated upon the negligence of the stevedore (hired by the charterer) in carrying out the stowage operation, irrespective of any direct negligence by the charterer." (emphasis supplied)

Nichimen and *Dempsey,* supra, held that in the case of *cargo stowage damage,* indemnity would lie for cargo damage from the time charterer under the Clause 8 only upon a showing of negligence or fault of the charterer causing the damage. The Court below, however, went further and said: ". . . However, such a restricted reading seems unjustified . . ." (20a) and held that clause 8 of the Time Charter Party shifted *all* responsibility for discharging to the charterer stating:

> ". . . In this view, the duty to perform the cargo operations carries with it an absolute obligation to indemnify the owner for any such damage, irrespective of any "fault" on the part of the charterer, and irrespective of the relationship, under agency law, between the charterer and the party

> which it employs to carry out its duties under the time charter agreement." (20, 21a)

The opinion of Judge Motley termed the alleged breach of charter party as contended by *Chios* as "a species of liability without fault on the part of the charterer in the nature of warranty of safe and proper performance of the cargo operations . . . (16a). Thus Judge Motley's opinion goes beyond and is contrary to the holding of *Nichimen* and/or *Dempsey & Associates, Inc.*, supra, which pertained, once more, to the rights and liabilities between the shipowner and the time charterer in a COGSA cargo damage case, flowing from the effect of Clause 8 relative to recovery of damages to cargo and indemnity rights arising out of the carriage of goods relation.

Isco contends that this case on appeal is not analogous to nor controlled by *Nichimen* and *Dempsey & Associates*, supra. The Court of Appeals in those *cargo damage actions* passed on the respective rights and liabilities of the owner and time charterer arising out of clause 8 of the time charter where ". . . it must be remembered, however, that the only issue here is primary liability for cargo damage . . ." *Nichimen* v. *M/V Farland, supra.* The interpretation by *Nichimen*, supra, of clause 8 is confined, contends *Isco*, to a cargo damage situation as reflected in the holdings of that case and the host of cases cited therein, all of which involve litigation among various cargo interests.

To be sure, there is no authority in *Nichimen*, supra, or elsewhere holding that there exists a warranty of workmanlike performance, a species of liability without fault with respect to a time charterer. While indeed there has been a continual expansion of the distribution of maritime risks, a time charterer, whether a cargo or personal injury claim be involved, has not yet been saddled with

such an implied warranty of workmanlike service. *McNamara* v. *Weischel Dampfschiffahrts Ag Kiel Germany*, 339 F 2d 475 (2 Cir. 1964) and *Cosmos SS Corp.* v. *U.S.A.*, 331 F. Supp 1319 (U.S.D.C., S.D. Wash). The language of Clause 8 relating to cargo negates any concept of implied warranty. It is hornbook law that it is the shipowner's responsibility to maintain a seaworthy ship and such a duty is nondelegable *Sea Shipping Co.* v. *Sieracki*, 350 U.S. 85, and *Isco* urges that under the space rental arrangement of the time charter and clause 8, the shipowner remains obligated for the seaworthiness of the ship. As was said in *Nichimen*, supra, at p. 331:

> ". . . Under the time charter, the owner bears continuing responsibility for the seaworthiness of the vessel. See *Gilmore & Black*, supra, Sec. 4-14, at 204. In performance of the responsibility, the Captain acts on behalf of the owner who "runs and mans the ship" id. at 205. It might seem reasonable then that the Captain's failure to correct improper stowage of cargo which poses a threat to the safety of the vessel, should it become unstowed, is the owner's responsibility . . ."

but this proper concept was not applied in that cargo damage case because:

> "It must be remembered, however, that the only issue here is primarily liability for cargo damage . . ." *Nichimen*, supra, at p. 331.

Clause 8 concerns obligations with respect to cargo only and does not embrace the liabilities flowing from injury to the person. Had the parties contemplated such indemnity rights flowing from injury claims, it would have been simple for the parties to word the charter agreement accordingly. The Court should not read into clause 8 a

meaning not expressed by its language so as to reach into the realm of liability, including indemnity rights, for injuries to seaman, longshoreman and others legitimately aboard the ship simply because the time charter expensed the stevedoring. *Cabot Corporation* v. *S.S. Mormacscan,* 441 F.2d 476 (2 Cir. 1971).

The liabilities of shipowner and time charterer for injuries to longshoreman and attendant indemnity rights have been ruled upon by the Courts and there is not a single reported decision interpreting clause 8 herein, holding a time charterer liable to a longshoreman or requiring a time charterer to indemnify the shipowner under Clause 8 or otherwise where the shipowner has been sued in unseaworthiness in a third-party injury case.

A time charter is an agreement for space on the ship and the time charterer has no property interest in the vessel. *Bergan* v. *International Freighting Corp.,* 254 F. 2d 231 (2 Cir. 1958). A time charterer assumes no liability with respect to a longshoreman's injuries from the unseaworthiness of the vessel or the negligence of the crew absent proof that the parties to the charter intended otherwise. *Wyche* v. *Oldendorff,* 284 F. Supp. 575 (E.D. V.A. 1967); *Serrano* v. *United States Lines, Co.,* 238 F. Supp. 383 (S.D.N.Y. 1965); *Mondella* v. *SS Elie V.,* 233 F. Supp. 390 (S.D.N.Y. 1963); *Bethusian* v. *Central Steamship Corp.,* 217 F. Supp. 903 (E.D. Pa. 1963); *Michle* v. *The Henriette Wilhemie Schult,* 188 F. Supp. 77 (N.D. Cal. 1960); *Klisewich* v. *Mediterranean Agencies, Inc.,* 302 F. Supp. 712 (E.D.N.Y. 1969).

Mondella v. *The SS Elie V., supra,* decided by Judge Bonsal, who incidentally was the trier of *Nichimen,* supra, is on all fours with this case on appeal. There, respondent Amerind, time charterer, moved for summary judgment in its favor on the libel of an injured longshoreman and also on the cross-claim of the respondent Elie, the

shipowner, claiming indemnity under this very Clause 8. At the time of the injury to *Mondella*, the ship was under a charter from Elie, as owner, to Amerind, under the same American Produce Exchange time charter involved here. Elie alleged that under the charter agreement between it and Amerind, the latter agreed to perform all stevedoring operations aboard the ship and by law impliedly warranted the proper performance of the stevedoring operations and would be liable under clause 8. Elie contended that control of the parts of the ship referred to in the libel had been turned over to Amerind in connection with the stevedoring operations and that if the libellant sustained any injuries, said injuries were caused by the negligence of Amerind, the time charterer, or by a condition created by it and those for whom it was responsible including their agents, servants, stevedores, etc. Judge Bonsal disallowed libellant's claim against the time charter and precluded the shipowner's indemnity claim as well.

The Court said at p. 392:

> [1-3] Under a time charter, the charterer merely rents cargo space, Randolph v. Waterman Steamship Corp., 166 F. Supp. 732, 733 (E.D.Pa.1958); and has no property interest in the vessel, Bergan v. International Freighting Corp., 254 F.2d 231, 232 (2d Cir. 1958). The shipowner's crew manages and controls the ship, Saridis v. Liberian S.S. Paramarina, 216 F.Supp. 794, 1963 A.M.C. 425, 428 (E.D.Va.1962). The responsibility for the seaworthiness of the ship rests upon the shipowner, and not the time charterer, and the time charterer owes no warranty of seaworthiness to seamen, longshoremen or other shoreside workers. Montoya v. M/S Peter Nielsen, 1962 A.M.C. 2515, 2519 (N.D.Calif. 1962). The loading and discharge of cargo is also

the shipowner's responsibility, Munson S.S. Line v. Glasgow Nav. Co., 235 F. 64, 67 (2d Cir. 1916); and the responsibility does not shift simply because the time charterer may appoint the stevedore. Montoya v. M/S Peter Nielsen, supra at 2518-2519 of 1962 A.M.C.

[4] None of the provisions of the time charter between Amerind and ELIE are at variance with the principles that are usually applicable between time charterer and shipowner. With respect to the seaworthiness of the vessel, the charter describes the ship as "good * * * and with hull, machinery and equipment in a thoroughly efficient state * * *". Paragraph 1 states that the owners shall "keep the vessel in a thoroughly efficient state in hull, machinery and equipment * * *". Thus, under the charter ELIE warrants to Amerind the seaworthiness of the ship. See Gilmore & Black, supra at 204.

Paragraph 8 of the contract provides:

> "8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts without prejudice to this Charter Party."

[5-7] This paragraph does not, as ELIE contends, shift the responsibility for stevedoring operations, or the control of the ship or any portion thereof, to Amerind. Indeed, it expressly provides

that cargo operations are to be under the Captain's supervision. Amerind's agreement to pay for the cargo operations does not make it responsible for the conduct of those operations. Munson S.S. Line v. Glasgow Nav. Co., supra, 235 F. at 68. ELIE's agreement that the charterer shall direct the Captain as regards employment and agency may be an attempt to isolate the owner from *in personam* liability to the cargo interest, Gilmore v. Black, supra at 208, but it does not place the Captain under the charterer's control with respect to the management of the ship and crew or give the charterer control over the Captain or ship in any respect that is material to the issues in this case. Saridis v. Liberian S.S. Paramarina, supra, 216 F. Supp. at 796-797; 1963 A.M.C. at 427 428; Apodoca v. Cia De Navegacione Del Plota, 18 Cal.Rptr. 869, 1962 A.M.C. 964, 968-969 (California Dist.Ct.App., 1st Dist., 1962); Montoya v. M/S Peter Nielsen, supra. The charter contains none of the special provisions which the Court in Munson S.S. Line v. Glasgow Nav. Co., supra, 235 F. at 68, suggested might shift the duty of unloading from the shipowner to a time charterer. Paragraph 4, cited by ELIE, is not such a provision since at most it provides for indemnity to ELIE by Amerind in the event of damage to the vessel.

The Court went on to state at page 393:

> [10] A time charterer is entitled to the dismissal upon motion of claims against it by crew members or longshoremen for personal injuries sustained aboard the chartered vessel in the absence of a showing of an affirmative duty owed by the time charterer. This has been the result, without exception, in cases involving the form approved by the

> New York Produce Exchange, which was the form used here, Saridis v. Liberian S.S. Paramarina, supra; Montoya v. M/S Peter Nielsen, supra; Apodoca v. Cia De Navegacione Del Plota, supra, and in cases involving other types of time charters. Travis v. Poseidon Lines, 203 F.Supp. 129 (N.D. Ill. 1962); Hoodye v. Bruusgaard Krosterud Skibs A/S Drammen, Norway, 197 F.Supp. 697 (S.D.Tex. 1961); Randolph v. Waterman Steamship Corp., Considine v. Black Diamond Steamship Corp., 163 F.Supp. 109, 110 (D.Mass.1958) (dictum); see also Munson S.S. Line v. Glasgow Nav. Co., supra.

A final appropriate decision to this case on appeal is *Vega* v. *Pan Am. Fruit Co.*, 1975 A. M. C. 187, 189 (S.D. N.Y. 1975), not otherwise reported, wherein former Judge Tyler ruled on the claimed responsibilities of a time charterer under a clause reading:

> "The charterers to be responsible for a loss or damage caused to the Vessel or to the Owners by goods being loaded contrary to the terms of the Charter or by improper or careless bunkering or loading, stowing or discharging of goods or any other improper or negligent act on their part or that of their servants." (p. 189)

In *Vega,* supra, the defendant time charterer argued that the foregoing provision applied not to third-party personal injury claims but only to physical damage to the vessel or its appurtenances caused by improper handling of cargo during loading or discharge. Citing *Mondella,* supra *Wyche,* supra, and *Mickle,* supra, the Court held that the ultimate responsibility for loading and discharging of cargo under a time charter remains with the owner as does responsibility for the vessel's seaworthiness even though the charterer may appoint the steve-

dore, provide dunnage shifting boards or even build the false decking which perhaps led to the longshoreman's accident. Judge Tyler confessed that the foregoing cases interpreted clause 8 of the American Produce Exchange form time charter which was not identical or substantially the same as the above quoted clause of a Uniform Time Charter of the Baltic and International Maritime Conference. However, Judge Tyler said at page 190:

> However, a close reading of the entire Clause 13 indicates that its function was to allocate responsibility between the owners and the time charterers for their losses and damage to the vessel or cargo; it does not cover responsibility for personal injury claims . . .

Clause 8 of the charter party involved in this appeal functions to allocate responsibility between the owners and time charterers with respect to cargo—it too does not cover responsibility for personal injury claims.

Were the opinion of the Court below valid it would give rise to a cause of action in favor of longshoremen directly against a time charterer in negligence an impact consistently disallowed by the many authorities cited by *Isco.*

CONCLUSION

The decision and order of the Court below granting indemnity in favor of Chios Shipping Co., Ltd., against States Marine Lines, Inc. should be reversed and the Third Party complaint of Chios Shipping Co., Ltd. dismissed.

Respectfully submitted,

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WILLIAM P. LARSEN, JR.
Of Counsel

375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United States Court of Appeals
For the Second Circuit

Jose Fernandez
Plaintiff
against
Chios Shipping Co. Inc.,
Defendant and Third Party Plaintiff-
Appell
against
Maher Stevedoring Company, Inc., and States Marine Lines
Third Party Defendants-Appellants
Chios Shipping Co. Inc.,
Fourth Party Plaintiff-Appellee
against
Castle & Cook Inc., Dole Corp. and Castle & Cook
Foods Corporation
Fourth Party Defendants-Appellants
On Appeal from The United States District Court
for the Southern District of New York

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for Boal Doti & Larsen Esqs. being duly sworn,

deposes and says that he is over the age of 21 years and resides at
Levittown, New York

That on the 15th. day of April , 1975

he served the annexed Brief upon

1. McHugh, Heckman Smith & Leonard Esqs.
Attorneys for Third Party Defendant-Appellant
Maher Stevedoring Company Inc.,
80 Pine Street, New York, New York

2. Boal Doti & Larsen Esqs.
Attorneys for Third Party Defendant-Appellant
States Marine Lines Inc.,
225 Broadway new York, New York

3. Fogarty & Wynee Esqs.
Attorneys for Fourth Party Defendants-Appellants
Castle & Cook Inc., Dole Corp. and Castle & Cook Foods Corp.
99 John Street
New York, New York

4. Zock Petrie Reid & Curtin
Attorneys for Third Party Plaintiff-Appellee and
Fourth Party Plaintiff-Appelle,
Chios Shipping Co. Ltd.
19 Rector Street
New York, New York

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 15th.

day of April, 1975

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Raymond J. Braddick